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FILED
OCT 6 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941

No. 203

H. D. RYAN AND L. G. HOWARD, TRADING AS KEYSTONE TRANSFER COMPANY,
Petitioners

vs.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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ARGUMENT

The brief of respondent, as did the opinion of the Superior Court of Pennsylvania, the subject of this petition, so vitally misconstrued the authority granted by the Interstate Commerce Commission in its order of April 3, 1940, prior to the attempted assumption of jurisdiction by the Pennsylvania Public Utility Commission that this reply is deemed justified.

This is made clear by the conclusions in Respondent's Brief, page 21, as follows:

> "We respectfully submit that there is no provision in the compliance order authorizing transporta-

tion between Pittsburgh and Washington, Pennsylvania, via Wheeling, West Virginia, nor between Pittsburgh and Uniontown, Pennsylvania, via Wheeling, West Virginia, nor any right to combine any of the routes described therein."

"Thus it is clearly to be seen that the compliance order does not authorize petitioner to render the service in question here, and under all the law and facts in this case, the Commonwealth of Pennsylvania was not precluded from determining that said operations did not constitute bona fide, interstate commerce *but were a subterfuge and in violation of the laws of the Commonwealth.*"

And further to the interpretation placed by the Respondents upon the decision of your Honorable Court in *Eichholz versus Public Service Commission of Missouri*, 306 U. S. 268 (1939) at page 17 of their brief where Respondents state the above case to be authority:

"That a state commission has jurisdiction to determine the question of subterfuge when the Interstate Commerce Commission has not, as yet, finally acted upon the application of the carrier filed with it."

The order referred to above is that issued by the Interstate Commerce Commission, Division 5 (designated the Motor Carrier Division), September 5, 1939 (Record, pages 373a-375a).

The order is shown to be issued upon the application of petitioners. The testimony of record shows the application to have been filed under the "grandfather" clause of the Federal Motor Carrier Act, Section 206 (a) (49 U. S. C. A. 306 (a)) (Record, page 247a).

The order of the Interstate Commerce Commission authorizing the operations herein complained of provided among other things as follows (Record, page 373a):

"It further appearing, that applicant or predecessor in interest was, on June 1, 1935, and continuously since has been in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specifications *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding, * * *" (Italics supplied)

The order further states (Record, page 374a), that upon compliance with named sections of the Motor Carrier Act and the rules and regulations prescribed by the Commission thereunder governing filing of common carrier rate publications and filing of evidence of security for protection of the public and so forth, a certificate of public convenience and necessity shall be issued unless otherwise ordered, authorizing the applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specifications set forth as appended on the reverse side of the order.

The Petitioners complied with these Sections of the Act and these rules and regulations (Record, page 247a).

Among the specified routes in the appendix (Record, pages 376a-378a) appear the following:

"Between Wheeling, West Virginia, and Pennsylvania points as follows:"

"From Wheeling over West Virginia Highway 2 to Weirton, West Virginia thence over U. S. Highway 22 to Pittsburgh, Pennsylvania, thence over Pennsylvania Highway 88 to Rochester, Pennsylvania, and thence over Pennsylvania Highway 18 to New Castle, Pennsylvania."

"From Wheeling over U. S. Highway 40 to Uniontown, Pennsylvania"

"From Pittsburgh over U. S. Highway 19 to Washington, Pennsylvania"

"All intermediate points on the above specified routes."

It is these routes which Respondent in its brief and the Superior Court of Pennsylvania in its decision represent transportation is limited with no right of interchange between the routes and no right to combine the routes in actual operation.

The record definitely shows that in connection with other interstate operations begun prior to June 1, 1935, into Ohio and West Virginia via Wheeling, West Virginia, and between Pittsburgh and Washington, Pennsylvania, via Wheeling, West Virginia, and between Pittsburgh and Uniontown, Pennsylvania, via Wheeling, West Virginia (Record, pages 254a, 291a, 294a, 295a), the Petitioners applied for a certificate under the "grandfather" clause of the Federal Motor Carrier Act to continue its interstate operations. The order of the Interstate Commerce Commission was issued in response to such application (Record, page 373a).

The Federal Motor Carrier Act, 49 U. S. C. A. 301, prescribes no limitation upon the right to interchange between or combine routes. Actually, Section 216 (c) of said act provides that common carriers of property by motor vehicle may establish reasonable through routes.

For that reason it has become the invariable practice of the Interstate Commerce Commission, in the absence of specific restrictions, to describe the regular routes in compliance orders and certificates in any manner which is most convenient with the intention that the entire operation is one unified system and the carrier may operate over the different portions thereof in any manner to suit his convenience and that of the public.

This practice and the recognition that an order authorizing operations over two or more routes which have one or more points in common authorizes operations over all combinations of such routes and between all points thereon over the routes specifically described in the order, have become so well accepted and so seldom contested that there are few reported opinions of the Interstate Commerce Commission thereto.

Petitioners in their original Brief, pages 12-13, cited *Dixie Freight Lines, Inc., Common Carrier Application*, 24 M. C. C. 780, 783:

> "To comply with interveners' request would be contrary to our general policy relative to extension applications, wherein we customarily describe only the proposed route as extended, and if such route is authorized the motor carrier has a right to transport interstate commerce over it to or from any point on its existing routes. This policy avoids duplication of authority."

That case is quite pertinent to the question here involved. Under a "grandfather" clause application the Commission found applicant to be a bona fide operation in interstate commerce between Montgomery, Alabama and Fort Benning, Georgia, via Opelika, Alabama and Columbus, Georgia, over Route 4. Under a finding of public convenience and necessity authority was granted to operate between Montgomery, Alabama, and Atlanta, Georgia, via Opelika, Alabama, over Route 3. Based upon such authorization the applicant published a tariff and transported property between Atlanta, Georgia and Columbus and Fort Benning, Georgia, via Opelika, Alabama. The Georgia Public Service Commission filed a petition for reconsideration, clarification and modification of the order. Upon oral argument before the Interstate Commerce Commission counsel for the Georgia Public Service Commission stated

that motor carriers had authority, from his Commission, to transport commodities between Atlanta and Fort Benning over a route within Georgia twenty-eight miles less than the contested interstate route via Opelika. He further contended that applicant's use of this route was a subterfuge to evade the intrastate regulations. *It was contended that the facts therein are somewhat similar to those in Eichholz v. Missouri Public Service Commission*, 306 U. S. 268 (1939).

In commenting upon this reference to the *Eichholz Case* the Interstate Commerce Commission, at pages 782-783, said:

> "In our opinion the facts in that case are not similar to those in the instant case. There can be no question but that property transported from Atlanta to Fort Benning via Opelika moves in interstate commerce. This is seen from the definition of that term in section 203 (a) (10) of the Motor Carrier Act, 1935, which reads as follows:
>
> 'The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.
>
> 'If we assume, for sake of argument, that applicant had not purchased the rights of R. E. Lewis, doing business as Lewis Transfer Company, embraced in No. MC-4378, that a certificate under the "grandfather" clause had been issued to Lewis to continue operation over route 3, and that applicant had been authorized under a finding of public convenience and necessity to continue the operation over route 4, under section 216 (c) of the Motor Carrier Act, 1935, appli-

cant and Lewis would have the right to establish reasonable through routes and joint rates applicable to property transported by applicant from Atlanta to Opelika and there interchanged with Lewis for Fort Benning delivery. We therefore fail to see the logic or reasonableness of the contention which would result in denying to applicant, the present owner of the rights of Lewis, the right to transport, without interchange at Opelika, property between Atlanta and Fort Benning over this interstate route. Moreover, in our opinion, the record contains no valid reason that would cause us thus to restrict the authority to be granted to applicant and to deprive the shipping public of applicant's transportation facilities between these Georgia points.' "

In the present case petitioners were operating between points in Pennsylvania via Wheeling, West Virginia under a similar order of the Interstate Commerce Commission, issued September 5, 1939 finding petitioners were on June 1, 1935, and continuously since, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce over such routes,—similarly to the situation above described (Record, page 373a). It was not until September 4, 1940, that the Pennsylvania Public Utility Commission sought to assume jurisdiction over petitioners by ordering them to cease and desist operating over the routes and between points authorized by the order of the Interstate Commerce Commission.

In other cases the Interstate Commerce Commission has recognized the right of interchange between routes described similarly to those in this order issued to Petitioners.

In *Keeshin Motor Exp. Co., Inc.*, (Illinois)—Leases, 1 M. C. C. 373, (1936), an early case involving unification of common-carrier general commodity operations, Division

5, of the Interstate Commerce Commission, stated at pages 380 and 381:

> "In their exceptions counsel for protestants further argue that the approval of this application would permit the extension of routes and the establishment of new routes without any regard to the public convenience and necessity for such new operations. This raises the question whether acquisition by one carrier of the operating rights of another gives such purchaser or lessee authority to render a through or unified service. The contention of protestants apparently is that, in addition to procuring approval of an application to acquire properties and operating rights, applicant should also procure, upon proof of public convenience and necessity, specific authority for such through or unified service. We cannot subscribe to an interpretation which would require such authority in addition to that which results from those operating rights which motor common carriers individually preserve or obtain as result of applications for certificates of public convenience and necessity. The right of motor common carriers to establish through routes over which through service is conducted is recognized by Section 216 of the Motor Carrier Act, 1935. It would be inconsistent to hold that such through service may not be rendered, without special proof of public convenience and necessity, after any such carriers are merged or otherwise unified."

The same conclusion was also reached by the Interstate Commerce Commission, even though the applicant had previously interchanged no traffic with the vendor in *Lee Way Motor Freight Inc.,—Merger*, 25 M. C. C. 520 (1939) where it was said at page 523 by the Commission:

> "DeShong and the surviving corporation have not interchanged traffic at Childress. Protestants con-

tend, therefore, that inasmuch as the proposed unification contemplates, among other things, institution of a new through service between Fort Worth and Dallas, on the one hand and Texas Panhandle points, on the other, via Childress gateway, the application should be disapproved in the absence of proof that the public convenience and necessity require such through service. With such contention we cannot agree, for in our opinion, where as here, a physical connection of routes exists, through service may be provided by unification of the operations theretofore in separate ownership, provided that we find the transaction to be consistent with the public interest."

In the application of *Andrew Clark—Lease—Clifford W. and Noel Ronken*, 36 M. C. C. 195 (1940) page 201, the Interstate Commerce Commission, through Division 4, found:

"We have heretofore found in unification cases that, where a physical connection of routes exist (which in the instant case, is at any point within southern Minnesota which applicant is at present authorized to serve), the acquiring carrier after such unification may render through service between all points authorized to be served on the connecting routes of both, provided it is found that the transaction considered as a whole, is consistent with the public interest."

See also the case of *Wilson Storage and Transfer Company—Purchase—Flamming Motor Express, Incorporated*, 35 M. C. C. 231 where the Commission found the purchase to be consistent with public interest and explained the method in which the routes could be operated. Said the Commission at page 235:

"Hence, so far as the rendering of through service between points on Transportation's Lake Benton-Man-

kato route, except Mankato, on the one hand, and points on applicant's St. Paul-Sioux Falls route, on the other, is concerned, the situation is not distinguishable from numerous cases where it has been found that, *upon transfer of existing rights to new ownership as a result of a section 213 proceeding, the acquiring carrier may render through service between all points on the physically connecting routes of both.* English—Purchase—Robison, 5 M. C. C. 221; Transamerican Freight Lines, Inc.—Purchase—Gormain, 5 M. C. C. 712; Gateway City Transfer Co., Inc.—Purchase—Minert, 15 M. C. C. 749, 751; and Lee Way Motor Freight, Inc.—Merger, 25 M. C. C. 520." (Italics supplied)

To adopt the interpretation of the Superior Court of Pennsylvania, the Public Utility Commission of Pennsylvania and its Brief herein filed, contrary to the above interpretations by the Interstate Commerce Commission, would throw into absolute confusion the thousands of orders, issued in form similar to that issued Petitioners, and demoralize the administration built up under the operation of the Federal Motor Carrier Act.

The Brief of Respondent rests upon this erroneous interpretation:

1. To bring the present case within the *Eichholz Case;*

2. To deny that the Interstate Commerce Commission had taken jurisdiction and granted authority over the routes in question;

3. To sustain the authority for order of the Pennsylvania Commission and the opinion of the Superior Court of Pennsylvania, upholding such order.

The present case is distinguishable from *Eichholz v. Public Service Commission of Missouri, supra,* in the following controlling essentials:

Argument

1. The State Laws

a. The Missouri Bus and Truck Act (laws of 1931 C. P. 307, 308), Section 5268 (b) declared it to be unlawful for any motor carrier (with certain immaterial exceptions) to use any of the public highways of the state in interstate commerce without first having obtained a permit from the Commission. Issuance of such permit required consideration of the kind and character of vehicles permitted over the highway and the filing of liability insurance or bond. The statute also authorizes the State Commission to prescribe regulations governing motor carriers.

b. The Pennsylvania regulatory laws provide no authority over interstate commerce through the issuance of any authority to regulate the use of its highways or otherwise. Section 1402 of the Pennsylvania Public Utility Law (66 P. S. § 1532) specifically provides:

> "Interstate and Foreign Commerce. The provisions of this act, except when specifically so provided shall not apply, or be construed to apply, to commerce with foreign nations, or among the several states, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress."

The order of the Commission (Record page 448a), the opinion of the Superior Court (Record, page 476a), and the brief of respondent claim no such authority over interstate commerce.

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2. Violation of Orders of State Commission

a. Eichholz violated orders of the Missouri Commission; (1) the permit of that Commission specifically limited him to operate as a freight carrying motor carrier over an irregular route between points in Missouri and points

beyond that State, "exclusively in interstate commerce", by operating between points in the State of Missouri; (2) the regulation of the State Commission governing such permits and prohibiting accepting for transportation property between points within the State; and (3) the order of the Missouri Commission establishing intrastate freight rates.

b. Petitioners have violated no order of the Pennsylvania Commission. As to (1) and (2) above, Pennsylvania was without authority. There was no order establishing freight rates intrastate in Pennsylvania to be violated. In obedience to the compliance order of Interstate Commerce Commission, of September 5, 1939, petitioners filed tariffs for transportation over the routes in question with the Interstate Commerce Commission.

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3. SUBTERFUGE

a. Eichholz under the facts as found by the District Court and recited in the opinion of your Honorable Court, did not in many instances unload merchandise at the terminal outside the State (Kansas City, Kansas) and only in a negligible percentage of the shipments between Missouri points were the goods unloaded at this out-of-State depot.

b. Petitioners, as shown by the record, in all instances unshipped the goods from the inbound truck to its platform at its Wheeling, West Virginia, terminal and reloaded them into outbound trucks for distribution over the various routes radiating from Wheeling into Ohio, West Virginia and Pennsylvania (Record, page 293a). It also appears that such operation through Wheeling, West Virginia, was the only manner in which petitioners could operate to handle the traffic moving between the three states and between the

points in Pennsylvania (Record, pages 262a, 266a, 300a-301a, 405a-406a).

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4. State Action Related to Federal Action

a. In the *Eichholz Case* (p. 273) when the State Commission revoked its permit the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act.

b. In the present case the Interstate Commerce Commission had acted upon petitioner's application under the Federal Motor Carrier Act through issuing to petitioners the compliance order on September 5, 1939 (Record, page 373a). The Pennsylvania Commission did not issue its order, requiring petitioners to cease and desist from operating over the routes in question and authorized by the above compliance order, until September 4, 1940 (Record, page 474a).

It is therefore clear that the *Eichholz Case, supra,* does not apply under the differing facts of the present case, and that the Superior Court of Pennsylvania erred in its reliance thereon.

Petitioners legitimately crossed the Pennsylvania line to establish interstate operations between Wheeling, West Virginia, and the Uniontown section of Pennsylvania in 1921. In May, 1934, the operations out of and through Wheeling, West Virginia, were extended over routes into Ohio, West Virginia and the Pittsburgh territory in Pennsylvania (Record, page 291a). Via Wheeling, West Virginia, these routes were conducted as one operation to permit the transportation of goods between Ohio and Pennsylvania and West Virginia; between West Virginia and Ohio and Pennsylvania points; as well as traffic between Pennsylvania points, necessary to the support of the traffic

between the different states (Record, pages 263a, 271a, 295a, 297a, 302a, 303a).

It was for the continuing operation of this combination of routings via Wheeling, West Virginia, that application was duly filed by petitioners under the authority and requirement of the Federal Motor Carrier Act. The Interstate Commerce Commission acting upon this application through its order of September 5, 1939, found that petitioners were on June 1, 1935 (the "grandfather" date), and continuously since, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce over this combination of routes, including those here questioned.

Wherefore, petitioners pray that your Honorable Court will issue a writ of certiorari to review the final decision of the Superior Court of Pennsylvania.

Respectfully submitted,

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